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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-442

JOHN H. POELKER, Mayor of the City of St. Louis, Missouri, and R. DEAN WOCHNER, M.D., Director of the Department of Health and Hospitals and Acting Hospital Commissioner of the City of St. Louis, Missouri,
Petitioners,

vs.

JANE DOE, AND A CLASS,
Respondents.

MOTION OF MISSOURI DOCTORS FOR LIFE FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Missouri Doctors for Life, a Not-for-Profit Corporation, respectfully moves for Leave to File a Brief as Amicus Curiae in Support of the Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in the within cause.

Missouri Doctors for Life is a Not-for-Profit Corporation, incorporated under the laws of the State of Missouri for the express purpose of providing a framework for systematic and continuous research and the education of physicians, other medical personnel, scientists, scholars and the public at large, concerning the biological and ethical facts of embryonic and fetal development, the meaning of sexuality and parenthood and the respect for life in all of its aspects.

Its membership includes over 375 practicing and teaching physicians in the City and County of St. Louis and one or more of its members can be found on the staff of almost every hospital in the community, including the general public hospitals operated by the City of St. Louis.

The physician members of Missouri Doctors for Life have a special interest in the litigation now before this Court because their right to practice medicine according to their best professional judgment and the dictates of their personal and individual consciences as well as the staffing practices and procedures of the St. Louis City Hospitals is under attack. We are frankly concerned that our rights as practicing physicians which are guaranteed under the Federal and State constitutions and specifically under Missouri State and Federal statutes are in jeopardy and for this reason we ask leave of this Court to present our views regarding the underlying principles upon which the dispute involved in this lawsuit should be determined.

The consent of Eugene P. Freeman, counsel for Petitioners, has been obtained and has been filed with this Court. The consent of Frank Susman, counsel for Respondent, has been requested and such consent was not granted.

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BRIEF AMICUS CURIAE OF MISSOURI DOCTORS FOR LIFE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF THE CASE

The plaintiff's complaint filed in the District Court sought a declaratory judgment holding certain alleged rules, regulations and practices of the General Public Hospitals of the City of St. Louis prohibiting the performance of abortion to be

violative of the Constitutional rights of the anonymous plaintiff and requested the Court to issue a permanent injunction restraining the defendants from implementing or enforcing said rules and regulations.

The evidence adduced in the trial of this case reflected that plaintiff Doe, with a history of 5 miscarriages since 1965, presented herself in August of 1973 for an examination at the St. Louis City Hospital to determine if she was pregnant. Laboratory tests confirmed that she was pregnant and she requested that an abortion be performed. All of the medical witnesses testified that they found no medical reason to indicate an abortion and that they knew of no one on the hospital staff who would perform an abortion on the plaintiff.

The District Court entered a memorandum and order denying the relief sought by plaintiff and dismissing her complaint.

On appeal the United States Court of Appeals for the Eighth Circuit held the City's policy prohibiting all non-therapeutic abortions in its publicly owned hospitals to be unconstitutional as an unwarranted infringement on the pregnant woman's right to privacy, and as a denial of equal protection to indigent pregnant women.

The Appellate Court also held the method of staffing the obstetrics-gynecology clinic of the city hospitals to be an unconstitutional denial of equal protection to those indigent pregnant women who, in exercising their right to privacy, may choose to terminate the pregnancy under the guidelines laid down in *Roe v. Wade* and *Doe v. Bolton*.

It was the judgment of the Appellate Court that the City owned hospital facilities be made available for abortion services and the District Court was directed to issue an injunction enjoining the enforcement of the City's anti-abortion policy and imposing upon the City the duty to obtain the services of

physicians and other necessary personnel whose personal views do not prohibit them from providing an abortion. The City was also directed to provide the necessary equipment and facilities for the performance of abortions in its public hospitals.

There were a number of amendments and modifications made by the Appellate Court and a timely petition for a writ of certiorari was filed by Petitioners Poelker and Wochner.

ARGUMENT

I

The Decision of the Appellate Court Is an Unconstitutional Infringement on the Rights of Physicians and Other Medical Personnel to Practice Medicine According to Their Best Professional Judgment and in Accord With the Dictates of Their Individual Consciences.

While the members of this organization are in fundamental disagreement with the holdings of this Court in *Roe v. Wade* and *Doe v. Bolton*, it is not our purpose to reargue those cases. We do, however, wish to call to this Court's attention how the Circuit Court of Appeals, ostensibly acting under the authority of *Roe* and *Doe* has fashioned a new and incredible judicial theory which is at variance with the majority opinion in those cases.

On four separate occasions in the majority opinion in *Roe v. Wade*, Justice Blackmun was careful to limit abortions only to those instances in which the medical judgment of the patient's treating physician dictated that the pregnancy should be terminated. He concluded that "the abortion decision in all its aspects is inherently and primarily a medical decision and *basic responsibility for it must rest with the physician.*" *Roe v. Wade*, 410 U.S. 113.

It is abundantly clear that under the Blackmun opinion a physician is free to prescribe and perform abortions only in those situations in which his best medical judgment dictates that the pregnancy should be terminated. Nowhere does the majority opinion hold or even infer that abortions can be performed for social, economic or other reasons.

The Chief Justice in the final paragraph of his concurring opinion in *Roe v. Wade* tried to allay the concern of the dissenting Justices (White and Rehnquist) in setting forth his

interpretation of the majority opinion. Justice Berger said "I do not read the Court's holding today as having the sweeping consequences attributed to them by the dissenting Justices; the dissenting views discount the reality that the vast majority of physicians observe the standards of their profession and act only on the basis of carefully deliberated medical judgments relating to life and health. *Plainly, the Court rejects any claim that the constitution requires abortion on demand.*"

Unfortunately, the views of the dissenting Justices were all too prophetic. In direct violation of the guidelines laid down in the majority opinion and the concurring opinion of the Chief Justice, many of the Federal Court decisions have made "abortion on demand" a constitutionally guaranteed right.

The opinion and judgment of the Court of Appeals directs the District Court to fashion "prompt and appropriate injunctive relief." Continuing, the Court decreed that "In addition to enjoining enforcement of the City's anti-abortion hospital policy, this relief should, at a minimum, impose upon the City the duty to obtain the services of responsible physicians and other necessary personnel whose personal views on abortion do not prohibit them from providing an abortion." (*Doe v. Poelker*, — F(2) —, 8th Circuit No. 75-1069).

Since all of the doctors on the staffs of the two City Hospitals hold personal views on abortion which prohibit the performance of this procedure, it logically follows that the Court's order requires at least one or more of said doctors to be replaced. In short, the Court's order necessarily requires the City of St. Louis to discriminate against those doctors who hold personal convictions against abortion with respect to the employment of physicians and the staffing of its public hospitals.

While it is true that the Court opinion directs that no present member of the staff of the public hospital be required to participate in an abortion against the dictates of his conscience, one or more physicians who hold personal views against abor-

tion will have to be replaced on the staff or will not stand on an equal footing with a physician who does not oppose abortion in the competition for any future staff position which may become available at the City's public hospitals.

The opinion, while paying lip service to the constitutional and statutory rights of many physicians in the St. Louis Metropolitan community who hold professional and moral views against abortion, actually and effectively denies such physicians their constitutional rights and renders the so-called "conscience clause" a nullity. The Court cannot escape the discriminatory consequences of its judgment by directing the injunction against the city officials. The discrimination is just as real and just as invidious, and the root cause of the discrimination is the edict of the Circuit Court. The obvious and logical effect of the opinion as it is applied to physicians opposed to abortion is unlawfully and unconstitutionally discriminatory.

The physician's right not to become involved in the abortion procedure is specifically guaranteed by the first amendment to the United States Constitution and by Section 5 of Article I of the Constitution of the State of Missouri which provides:

> "That all men have a natural and indefeasible right to worship almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the right of conscience; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office or trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; * * *"

Section 197.032 Revised Statutes of Missouri (1973) provides:

> 1. No physician or surgeon, registered nurse, practical nurse, midwife or hospital, public or private, shall be required to treat or admit for treatment any woman for the

> purpose of abortion if such treatment or admission for treatment is contrary to the established policy of, or the moral, ethical or religious beliefs of, such physician, surgeon, registered nurse, midwife, practical nurse or hospital. No cause of action shall accrue against any such physician, surgeon, registered nurse, midwife, practical nurse or hospital on account of such refusal to treat or admit for treatment any woman for abortion purposes.
>
> 2. No person or institution shall be denied or discriminated against in the reception of any public benefit, assistance or privilege whatsoever or in any employment, public or private, on the grounds that they refuse to undergo an abortion, to advise, consent to, assist in or perform an abortion.
>
> 3. Any person who shall deny or discriminate against another for refusal to perform or participate in an abortion shall be liable to the party injured in an action at law, suit in equity or other redress."

42 U.S.C.A. Section 300a-7 provides as follows:

> "(a) The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other public authority to require
>
> (1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or
>
> (2) such entity to—
>
> (A) make its facilities available for the performance of any sterilization procedure or abor-

tion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or

(B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedure or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

(b)(1) No entity which receives a grant, contract, loan or loan guarantee under the Public Health Service Act, the Community Mental Centers Act, or the Development Disabilities Services and Facilities Construction Act after June 18, 1974, may—

(A) *discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel,* or

(B) discriminate in the extension of staff or other privileges to any physician or other health care personnel,

because he performed or assisted in the performance of a lawful sterilization procedure or abortion, *because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions,* or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions."

Concomitant to the physician's right of conscience in this matter is the guarantee that he will not be discriminated against in his employment by reason of his beliefs and practices with

respect to abortion. In addition to the aforementioned constitutional and statutory guarantees, the charter of the City of St. Louis provides as follows:

Article XVIII, Civil Service:

"*Sec. 3,* (n) *Removals and demotions.*—For removals, demotions and decreases in pay in the cases of employes whose service rendered in below satisfactory standards, designed to promote the efficiency of the service. Such action shall be effective only after written notice to, with right of appeal in, the employes affected, and after such investigation as is appropriate to insure that the action taken is on the sole ground of merit and fitness.

Sec. 16, Racial, political and religious discrimination.—No recommendation or question under the authority of this article shall relate to the race, political or religious opinions, affiliations or service of any person. No person shall be appointed to a position in the classified service hereunder, nor be demoted, re-employed, promoted, removed, increased or reduced in compensation, nor in any other way be favored or discriminated against in any matter within the purview of this article, because of his race, political or religious opinions, affiliations or service."

The physician's right in this matter has been specifically recognized by a First Circuit in the case of *Doe v. Hale,* 500 Fed. 2d 144, 147, where the following quotation is found:

"Nor does this order require that any individual member of the staff of Hale Hospital or any employee of Hale Hospital participate or assist in any way in the performance of abortions if that person as a matter of conscience objects to so doing."

It goes without saying that if a physician or other medical assistant can be denied employment on the basis of his moral convictions regarding abortion, the aforementioned rights guar-

anteed specifically under the Constitution and the law have been violated. Surely the pregnant women's right of privacy with respect to the abortion decision is not superior to the physicians right to practice medicine according to his best professional judgment and the dictates of his conscience and his further right not to be discriminated against with respect to his employment on account of his moral beliefs.

II

The Opinion of the Court of Appeals Is Contrary to and Misinterprets the Holding of This Court in Roe v. Wade and Doe v. Bolton.

The record in the instant case is totally devoid of any evidence which indicates that there was any medical reason for the termination of plaintiff Doe's pregnancy. Quite to the contrary, each medical witness who testified in the case stated that on the basis of his examination no medical condition could be found which indicated that the pregnancy should be terminated.

In *Roe v. Wade*, 410 U.S. 113 and *Doe v. Bolton*, 410 U.S. 179 this Court held that "the abortion decision in all its aspects is inherently and primarily a medical decision and basic responsibility for it must rest wth the physcian." In the instant case, the abortion decision was made by the woman without the consultation of any physician. The several staff physicians who examined Respondent Doe testified that in their professional judgment there was no medical reason to terminate her pregnancy.

The staffing procedures at the St. Louis City Hospitals which are condemned by the Court of Appeals were in effect long before the *Doe* and *Roe* decisions. These procedures were not put into effect to circumvent the rights of indigent women in respect to the abortion decision, but the Court of Appeals now finds these procedures to be unconstitutional.

As a practical matter a pregnant woman who seeks treatment at one of the City hospitals in St. Louis is referred to one of the physicians on the staff. The Court of Appeals is now saying that the City hospitals must staff their facilities so that one or more physicians on the staff is not morally opposed to non-therapeutic abortions. A woman seeking an abortion should then, we suppose, be referred to that particular physician. But such a procedure is not in accord with the teachings of *Roe* and *Doe* which expressly denies that the constitution requires abortion on demand and holds that the abortion decision is a medical decision to be made by the physician. In the instant case, the abortion decision was made by the woman and the Court of Appeals is now telling the City hospital that it must find a physician who agrees with the woman's decision and who will effectuate the termination of her pregnancy.

Unfortunately many of the Federal Court decisions on this issue have disregarded the clear and unequivocal pronouncements in *Roe* and *Doe* and have expanded those decisions from a prohibition against state interference in the abortion decision to a positive requirement that public hospitals provide doctors and facilities for the termination of pregnancies of women who appear and demand the abortion service.

Nowhere in *Roe* and *Doe* do we find any support for the thesis that abortions must be performed for women who choose to terminate their pregnancy for social or economic reasons. And yet the Court of Appeals in this case has ordered the City hospitals of St. Louis to change their staffing procedures and to specifically hire physicians and other personnel willing to perform abortions on the basis of a request made by a woman who provided no evidence that there was any medical reason or justification for the termination of her pregnancy.

We respectfully submit that such a holding is contrary to the pronouncements of this Court in *Roe* and *Doe* and should not be permitted to stand.

CONCLUSION

Because very fundamental rights of physicians and other medical personnel have been disregarded by the Appellate Court in its headlong rush to provide abortion services to indigent women, we earnestly request the Court to issue a writ of certiorari as prayed for by Petitioners and review the opinion and judgment of the Eighth Circuit. We are certain that this Court will find that the opinion of the Circuit Court is not a logical extension of *Roe* and *Doe* but an obvious perversion of the teaching of those cases.

Until very recently, the performance of a non-therapeutic abortion in the State of Missouri was a felony. In a little over two years time the Courts have elevated "abortion on demand" to the status of a constitutionally guaranteed right in direct defiance of the holdings of this Court. The rights of physicians and other medical personnel have been totally ignored or given little consideration.

We honestly feel that when an Appellate Court on the basis of the record in this case can order a public hospital to dramatically change its long established staffing procedures and make consent to perform abortions a condition of employment, it is absolutely essential for this Court to review and correct such a decision taking into account the constitutional rights of all parties concerned.

Respectfully submitted

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